

# **Wisconsin Judicial Council & Committees**

## **Project Update**

### **June 2017**

#### **Appellate Procedure Committee: Current Projects**

- Study and reorganize procedural rules for prisoner challenges to agency decisions to provide greater clarity and reduce errors on appeal. A bill has been drafted and approved by the Council. Introduction is anticipated in 2017.
- Study and recommend amendments to Rule 809.15 to promote greater consistency and completeness of the record on appeal. A supreme court rule petition was filed May 26, 2017.
- Study and recommend a rule for substitution and withdrawal of counsel while an appeal is pending. A rule draft has been completed and is ready for circulation for comments from potentially interested parties.
- Study and recommend rules addressing size and number of briefs in multiparty appeals in response to questions raised by the court in *Henshue Construction, Inc. v. Terra Engineering & Construction Corp.*, 2012AP1038, August 21, 2012 Order. A supreme court rule petition was filed May 4, 2017.

#### **Criminal Procedure Committee: Current Projects**

- Study possible amendments to the rules of discovery in criminal cases.

#### **Evidence & Civil Procedure Committee: Current Projects**

- Study amending rules regarding spoliation of evidence, consistent with amendments to the federal rules.
- Study whether to recommend codification of the expert witness privilege as recognized by the Wisconsin Supreme Court in *Burnett v. Alt*, 224 Wis.2d 72, 589 N.W.2d 21 (1999) and its progeny.
- Study sufficiency of notice in statutory provisions regarding service, including Wis. Stat. § 885.03.
- Study amending Wis. Stat. § 804.01(2)(d) regarding discovery of communications between trial counsel and expert witnesses to bring it in line with the corresponding federal rule.

- Study Wis. Stats. §§ 806.02 and 802.07 to recommend whether defendants filing cross-claims or counterclaims should be able to seek a default judgment.
- Study the Uniform Unsworn Domestic Declarations Act (UUDDA) to determine whether it should be recommended for adoption in Wisconsin.

### **Judicial Council Accomplishments: 2009-2017**

- Drafted and filed supreme court rule change petition amending Wis. Stat. § 809.23(3) to permit parties to cite to unpublished court of appeals decisions. Prior to the amendment, certain areas of practice (for example, small claims, termination of parental rights, juvenile, mental commitment, civil forfeiture, etc.) suffered from limited citable case law because opinions generally are issued by a single judge of the court and routinely are not published. The rule promotes greater consistency in the court's decision-making process, which is likely to reduce the number of appeals. Rule was adopted by supreme court order 2009 WI 2.
- Drafted bill tolling the time limit for filing a petition for review in the supreme court while a motion for reconsideration is pending in the court of appeals. See Wis. Stat. § 809.24. The rule promotes more efficient court process and saves parties' unnecessary attorneys' fees incurred by filing duplicative pleadings. Bill enacted as 2009 Wisconsin Act 25.
- Drafted bill specifying that appeals in chapter 980 (sexually violent person) and section 971.17 (not guilty by reason of mental disease or defect) commitment proceedings are subject to the unified appeal procedure in Wis. Stat. sections (rules) 809.30 through 809.32, creating a more efficient and consistent court process. See Wis. Stats. §§ 809.30-32, 48.465, 938.47, 971.17(7m), and 980.038(4)(a). Bill enacted as 2009 Wisconsin Act 26.
- Drafted bill allowing suppression of evidence issues to be raised on appeal in chapter 938 (Juvenile Justice Code) cases in which the juvenile has admitted to the delinquency petition. This amendment preserves constitutional rights of juvenile defendants, and improves judicial efficiency by avoiding unnecessary trials. See Wis. Stats. §§ 808.03(3), 938.297(8), and 971.31(10). Bill enacted as 2009 Wisconsin Act 27.
- Worked with the Wisconsin Municipal Judges Association and the Legislature on comprehensive amendments to the laws governing municipal courts. ). Bill enacted as 2009 Wisconsin Act 402.

- Drafted and filed supreme court rule change petition amending Wis. Stat. § 904.085 (4) (e) to require an in camera hearing to protect potentially confidential mediation communications from being revealed in open court prior to a ruling on admissibility. Rule was adopted by supreme court order 2010 WI 31.
- Monitored the collaborative work between the Institute for the Advancement of the American Legal System and the American College of Trial Lawyers, including efforts to identify perceived problems of cost and delay in the U.S. civil justice system and implement pilot projects to aid in developing possible solutions.
- Studied the issue of compensation of court-appointed attorneys under SCR 81, at the request of the supreme court.
- Completed recommendations for legislative amendments to the statutes regarding presentence investigation reports. This has been a huge undertaking over the past eight years, and involved collaborative work with two different advisory committees, as well as consultations with many different stakeholders, including the Department of Justice, the Department of Corrections and the District Attorneys Association. Legislative Reference Bureau (LRB) prepared a bill and analysis. Legislative introduction pending.
- Studied the need for procedural rules governing ghostwriting of legal documents. Drafted recommendations to the Planning and Policy Advisory Committee (PPAC). PPAC drafted proposed rules and the Supreme Court issued an order to amend and create rules and statutes to support and expand "limited scope representation." Rules were adopted by supreme court order 2014 WI 45.
- Studied and made recommendations concerning calculation of time for appeals and requests for new trials in small claims cases. The State Court's Records Management Committee amended the instructions on the applicable small claims form to provide clarification consistent with the Council's recommendation.
- Studied and issued recommendation regarding precedential value of overruled court of appeals' decisions following *Blum v. 1st Auto & Cas. Ins. Co.*, 2010 WI 78.
- Created rules to govern the discovery of electronically stored information. See Wis. Stats. §§ 802.10, 804.01, 804.08, 804.09, 804.12, and 805.07. These amendments increase judicial efficiency by improving consistency and predictability in the discovery process which thereby can eliminate the need for multiple motion hearings; the amendments also reduce the economic burden on the parties that can result from this type of discovery. Adopted by the supreme court. Rules were adopted by supreme court order 2010 WI 67; 2010 WI 129.

- Studied and issued recommendations concerning plea withdrawal, at the request of the court of appeals.
- Studied and drafted rules to address inadvertent disclosure of privileged information. See Wis. Stat. §§ 804.01(7), 805.07(2)(d), 905.03(5), and Wis. Stat. § 804.01(2)(c). The proposed amendments resolve uncertainty in the courts about the effect of certain disclosures of communications or information protected by the lawyer– client privilege or as work product. Adopted by the supreme court. Rules were adopted by supreme court order 2012 WI 114.
- Studied and made recommendation concerning the issue of “presence” and provided a recommendation regarding whether a definition should be incorporated into the Code of Criminal Procedure.
- Studied the need for a law governing the transfer of structured settlement payments. Provided recommendation to the Legislative Council, which accepted the project and appointed a study committee. A draft bill was unanimously approved by the study committee and enacted as 2015 Wisconsin Act 94.
- Studied and drafted rule to protect the identity of crime victims in appellate documents that are publically available via the internet. Rule was adopted by supreme court order 2015 WI 21.
- Studied the Uniform Interstate Depositions and Discovery Act, at the request of the Wisconsin Uniform Law Commission. Drafted a rule based on the uniform act. Rule was adopted by supreme court order 2015 WI 70.
- Studied and made recommendations regarding possible revisions to the Wisconsin Rules of Evidence, including the Deadman’s Statute (Wis. Stat. § 885.16), the addition of a bias rule, the rule of completeness (Wis. Stat. § 901.07), statements of injured persons (Wis. Stat. § 904.12, “other acts” evidence (Wis. Stat. § 904.04), witnesses’ character for truthfulness (Wis. Stat. § 906.08), authentication of records of regularly conducted activity (Wis. Stat. § 908.03), impeachment by prior criminal conviction (Wis. Stat. § 906.09), definition of hearsay (Wis. Stat. § 908.01), statements of recent perception (Wis. Stat. § 908.045 (2)), and privileged communications (Wis. Stat. § 885.205). Rule petition to repeal the Deadman’s Statute and amend Wis. Stat. § 906.01 was adopted by Supreme Court order 2017 WI 13. Petition to amend the remaining rules is pending with the court (16-02).
- Studied and drafted 2015 Assembly Bill 90 and Senate Bill 82, containing a comprehensive revision to the Code of Criminal Procedure (except Chapter 973, Sentencing) that was introduced in the Legislature in 2015. It received a public hearing before the Senate and Assembly Judiciary Committees. A substantial amendment has been drafted and the bill is awaiting reintroduction.

- Drafted a comprehensive amendment of Wisconsin's class-action statute to bring it in line with the federal rule (Rule 23 of the Federal Rules of Civil Procedure), consistent with the actions of at least 43 other states. Wisconsin's current 49-word class-action statute is a remnant of the 1849 Field Code and provides very little guidance to the courts or the parties. A rule based on the federal model will provide more guidance because the federal rule is very comprehensive and it will allow Wisconsin circuit court judges and litigants to look to the very large body of federal case law to interpret and apply the rule. A supreme court rule petition is currently pending (17-03).